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Supreme Court, U.S.
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In The

Supreme Court of the United States

VINCENT HENDERSON, DARYELLE REXRODE AND JOHN CALELLA,

Petitioners,

v.

STUART O. SIMMS, RICHARD A. LANHAM, SR. AND WILLIAM O. FILBERT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment permit state officials to revoke a released prisoner's mandatory supervision release status without affording him any sort of hearing?

PARTIES TO THE PROCEEDING BELOW

The petitioners in this Court, Vincent Henderson, Daryelle Rexrode, and John Calella, all individuals, were the plaintiffs in the District Court and the appellants in the Court of Appeals. The respondents, Stuart O. Simms (Secretary of the Maryland Department of Public Safety and Correctional Services), Richard A. Lanham, Sr. (at all relevant times, Commissioner of the Maryland Division of Correction) and William O. Filbert (Warden of the Maryland Reception, Diagnostic and Classification Center) (collectively, the "State Officials"), also individuals, were the defendants in the District Court and the appellees in the Court of Appeals.

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OPINIONS BELOW

The Court of Appeals opinion that the petitioners ask this Court to review is *Henderson v. Simms*, 223 F.3d 267 (4th Cir. July 28, 2000). The District Court opinion is *Henderson v. Simms*, 54 F. Supp. 2d 499 (D. Md. 1999). Both opinions are reproduced, along with the petitioners' complaint in the district court and the relevant authorities, in the Appendix.

JURISDICTIONAL BASIS

This petition asks the Court to review the July 28, 2000, opinion and judgment of the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the decision of the district court, which had dismissed the petitioners' claims under 42 U.S.C. § 1983 because, it held, the respondents were entitled to qualified immunity. Should the Court grant the petition, it would have jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment XIV, Section 1 (excerpt; full text set forth in Appendix):

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This petition asks the Court to review the United States Court of Appeals for the Fourth Circuit's decision affirming the United States District Court for the District of Maryland's dismissal of the petitioners' claims under 42 U.S.C. § 1983. The petitioners' complaint challenged, on Fourth and Fourteenth Amendment procedural due

process grounds, the State Officials' actions in arresting and incarcerating Messrs. Henderson, Rexrode, and Calella and in failing to provide the three with a hearing at, about, or after the time of their respective separate arrests and incarcerations on May 1, 1998. The petitioners ask this Court to review and reverse the Fourth Circuit's decision only as to the State Officials' refusal to afford the petitioners any sort of pre-, peri- or post-arrest hearing.

As set forth in their complaint, App. 27-45, Messrs. Henderson, Rexrode, and Calella had been released properly from State incarceration months or years earlier on a parole-like status called "mandatory supervision release." Following their release, the State's highest court issued its decision in *Beshears v. Wickes*, 349 Md. 1, 706 A.2d 608 (1998), a case involving the calculation of statutory sentence diminution credits. The State Officials decided to apply *Wickes* retroactively to recalculate the credits earned, and thus the release dates, of all affected Maryland prisoners, even those released prior to *Wickes*. After performing their post-*Wickes* sentence recalculations for petitioners and others already at liberty on mandatory supervision release, the State Officials unilaterally revoked the petitioners' release status, had them arrested, and reincarcerated them, *all without any sort of hearing*.

Mr. Henderson initially challenged the State Officials' actions by filing an emergency petition for a writ of *habeas corpus* in the Circuit Court for Baltimore City, Maryland on May 8, 1998. The Circuit Court granted Mr. Henderson's petition on May 14, 1998, and ordered his release. After the State Officials' motion for a stay was denied (prior to appellate review), Mr. Henderson was

released from incarceration. Several days later, after the Maryland Court of Appeals denied the State Officials' second motion for a stay (prior to briefing and argument in the appellate court), Messrs. Rexrode and Calella were released as well. The State Officials appealed the Circuit Court's decision and the Maryland Court of Appeals affirmed. *Department of Corrections v. Henderson*, 351 Md. 438, 718 A.2d 1150 (1998) ("*Henderson I*").

On April 6, 1999, Messrs. Henderson, Rexrode, and Calella filed the present action in the United States District Court for the District of Maryland. App. 27-45. The complaint did not contest the *substantive* legality or reasonableness of the State Officials' decision to recalculate the petitioners' respective release dates. *Id.* After all, *Henderson I* already had held that the State Officials' decision to rearrest and reincarcerate Mr. Henderson (and by extension, Messrs. Rexrode and Calella) was wrong. Rather, the petitioners' federal complaint alleged, *inter alia*, that the State Officials, acting under color of state law, violated the petitioners' clearly established constitutional rights under the Due Process Clause of the Fourteenth Amendment when they denied the petitioners a hearing to challenge their arrest and incarceration. The State Officials moved to dismiss the case on the ground that they were entitled to qualified immunity. The District Court (Smalkin, J.) granted the motion and dismissed the case without addressing whether the complaint stated valid constitutional claims. *Henderson v. Simms*, 54 F. Supp. 2d 499 (D. Md. 1999), App. 19-26.

The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed. *Henderson v. Simms*, 223 F.3d 267 (4th Cir. 2000) (K. Williams,

J.), App. 1-18. The Court of Appeals held that the State Officials had not violated the petitioners' due process rights because, the petitioners lacked a constitutionally protected liberty interest. 223 F.3d at 273-75, App. 14-17. In the alternative, the Court of Appeals held that the State Officials were entitled to qualified immunity because the right to a hearing was not "clearly established" for "mistakenly released" prisoners. *Id.* at 275, App. 16-17.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S DECISIONS IN *MORRISSEY v. BREWER* AND ITS PROGENY.

The Court of Appeals' decision in this case suffers from a fundamentally flawed understanding of the Due Process Clause principles this Court has articulated in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and its progeny. The petitioners, without exception, were properly released and had fulfilled the conditions of their release when the State Officials revoked their release status and returned them to jail. As such, the petitioners had a constitutionally protected interest in remaining at liberty and, as a matter of federal constitutional law, that interest could not be revoked without a hearing. The State Officials were obliged by *Morrissey* and the cases following it to afford the petitioners a hearing, whether or not the State Officials believed, reasonably or otherwise, that they could treat the petitioners as "escapees." The State Officials' failure to afford petitioners a hearing violated petitioners' constitutional rights, and the lower courts'

failure to recognize this violation merits review by this Court.

A. THE PETITIONERS HAD A CONSTITUTIONALLY PROTECTED INTEREST IN REMAINING AT LIBERTY.

For decades, this Court has recognized that inmates released on parole or similar release status have a constitutionally protected interest in their continued freedom. The decision below violates these core holdings and the long-established constitutional principles they embody. There is no dispute that Messrs. Henderson, Rexrode, and Calella were released properly and in strict conformity with the laws and regulations in force at the time the State Officials released them and, therefore, petitioners were properly at liberty. Accordingly, all three men had a constitutionally protected interest in remaining free, subject to the terms and conditions of their release (which the State Officials do not, and cannot, claim that they ever violated). The lower courts' holding that the petitioners, as "escapees," lacked a protected liberty interest violates this Court's Due Process Clause precedents and should not be permitted to stand.[1]

This case is about the petitioners' important procedural right to a hearing at or about the time the State Officials decided to revoke their mandatory supervision

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[1] The Court of Appeals' characterization of the petitioners as "escapees" contradicts the State Officials' explicit concession during oral argument in the Court of Appeals that the petitioners in fact had a constitutionally protected interest in remaining at liberty.

release. That right, and the petitioners' ability to pursue and enforce that right, does not depend in any way on whether the State Officials might also have violated their substantive rights. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the right to procedural due process is 'absolute' in the sense that it does not depend on the merits of the claimants' substantive assertions"); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) (Fourteenth Amendment procedural safeguards must be provided before property interest is lost "whatever the ultimate outcome of a hearing"). But the distinction between the State Officials' decision to recalculate sentences (which is not at issue here) and how that decision was implemented (which is) is central to understanding why the holding below is wrong. *Cf. Carey*, 435 U.S. at 266; *Fuentes*, 407 U.S. at 87.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court held that the Due Process Clause entitled parolees to hearings whenever state officials sought to revoke their parole and, correspondingly, their liberty. *See* 408 U.S. at 482. The Court has long since extended this principle to reach probationers facing a revocation of their liberty, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), incarcerated prisoners facing revocations of good time credits in disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539 (1974), incarcerated prisoners facing transfer to mental institutions, *Vitek v. Jones*, 445 U.S. 480 (1980), and most recently to an inmate facing revocation of his release via a "pre-parole" program. *Young v. Harper*, 520 U.S. 143 (1997). The exact procedures required by the Due Process Clause vary across situations, but in each case – and especially, like here, where the deprivation at issue involves the

person's physical liberty – the Due Process Clause entitles the person to an appropriate opportunity to contest the deprivation. *Compare Jago v. Van Curen*, 454 U.S. 14, 21 and n.3 (1981) (distinguishing a situation in which state officials revoked a decision to grant parole before the inmate had been released).

The Court of Appeals' holding that the petitioners were "escapees" with no liberty interest, and thus *no* right to a hearing, drains the word "liberty" of its profound and profoundly important meaning. This Court should grant the writ in order to reverse the lower courts' misreading and misapplication of this Court's Due Process precedents. This Court has not hesitated in the past to review and reverse lower court decisions at odds with this Court's constitutional precedents. *See Dickerson v. United States*, ___ U.S. ___, 120 S. Ct. 2326 (2000); *Hetzel v. Prince William County, Virginia*, 523 U.S. 208 (1998); *United States v. Virginia*, 518 U.S. 515 (1996); *see also Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495 (2000). This case is equally worthy of the Court's review and reversal.

B. THE STATE OFFICIALS DENIED THE PETITIONERS THEIR CLEARLY ESTABLISHED RIGHT TO A HEARING TO CHALLENGE THE REVOCATION OF THEIR RELEASE STATUS.

In the third count of their complaint, the petitioners alleged that the State Officials violated petitioners' Fourteenth Amendment procedural due process rights when the State Officials failed to provide petitioners *any* pre-, peri- or post-revocation hearing. Complaint, ¶¶ 43-47, App. 41-42. This case does not, therefore, present any

issue regarding "what process was due" or the adequacy or timing of a hearing. *The undisputed fact is that the State Officials afforded these men no hearing or opportunity of any sort, at any time before or after their arrest.* *Id.*, ¶¶ 27-28, 43-47, App. 37, 41-42. This total failure to afford the petitioners a hearing to challenge the revocation of their release status, and the deprivation of their liberty, violated the petitioners' clearly established rights under the Due Process Clause.

In *Morrissey*, the Court held that two types of hearings are required whenever state officials seek to revoke a released prisoner's parole. First, "some minimal inquiry [must] be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and available." 408 U.S. at 485. This hearing is "in the nature of a preliminary hearing to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Id.* At this preliminary hearing, "the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged." *Id.* at 486-87. Thereafter, the hearing officer shall determine whether "there is probable cause to hold the parolee for the final decision of the parole board on revocation." *Id.* at 487. Following this preliminary hearing, and assuming probable cause is found, there must be a formal revocation hearing which "must lead to a final evaluation of any contested relevant facts and consideration of whether the

facts as determined warrant revocation." *Id.* at 488. The Court then summarized the elements of this two stage hearing process and characterized them as embodying "*the minimum requirements of due process.*" *Id.* at 488-89 (emphasis added).

Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973), reiterated *Morrissey*'s holding "that a parolee is entitled to two hearings, one a preliminary hearing *at the time of his arrest and detention* to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision" (emphasis added). The Court held further "that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*." *Id.* at 782 (footnote omitted). *See also Greenholtz v. Inmates of Nebraska*, 442 U.S. 1, 9 (1979) (reviewing holdings in *Morrissey* and *Gagnon* and noting a parolee's protected liberty interest); *Black v. Romano*, 471 U.S. 606, 610-11 (1985) ("*Morrissey* and *Gagnon* outline the minimum procedural safeguards required by due process" to revoke "the conditional liberty created by probation"). And putting aside that the Fourth Circuit had expressly followed the *Morrissey-Gagnon* holdings and extended them to releasees situated similarly to the

petitioners,[2] this Court long ago extended these principles to reach incarcerated prisoners facing revocations of good time credits in disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539 (1974), incarcerated prisoners facing transfer to mental institutions, *Vitek v. Jones*, 445 U.S. 480 (1980), and more recently (but well in advance of the operative events here) to inmates facing revocation of release via a "pre-parole" program. *Young v. Harper*, 520 U.S. 143 (1997).

The combination of Maryland law granting mandatory supervision release to Maryland prisoners, Maryland regulations affording them hearings whenever state officials seek to revoke that status, and the petitioners' compliance with the conditions of their release created in these petitioners objectively "justifiable expectation[s]" of remaining at liberty and of hearings before the State Officials could take away their liberty. *See Vitek v. Jones*, 445 U.S. 480, 489 (1980). And "if the State grants a prisoner a right or expectation that adverse action will not be taken against him except on the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.' " *Vitek*, 445 U.S. at 490-91 (quoting *Wolff v. McDonnell*, 418 U.S. at 558). Accordingly, the Due Process Clause required the State Officials to

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[2] *See Pope v. Chew*, 521 F.2d 400, 405 (4th Cir. 1975) (requiring a hearing before a "conditional pardon could be revoked"); *United States v. Copley*, 978 F.2d 829, 831 (4th Cir. 1992) (holding that *Morrissey* and *Gagnon* meant that a term of "supervised release" could not be revoked without due process).

afford the petitioners hearings when they revoked the petitioners' mandatory supervision release and reincarcerated them.

Few principles of federal constitutional law were more clearly established on May 1, 1998 than the right of persons on parole or parole-like release status to "some kind of hearing." *See* H. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). Indeed, the core legal principles have been clearly established since no later than 1973, following the Court's decisions in *Morrissey* and *Gagnon*. The analysis of whether "some kind of hearing" is required is straightforward: Does the individual have a constitutionally protected liberty interest which government officials propose to take away? If the answer to that question is "yes," as it most certainly was here, long-settled constitutional law required a hearing and the State Officials violated the petitioners' constitutional rights when they refused to provide one.

This case demonstrates all too vividly that state officials can be wrong, "understandably" or otherwise and that procedural due process matters. Mr. Henderson *prevailed* in his state *habeas* case, and he and the other men were released as a result of that court's scrutiny of the State Officials' actions and motivations. One judge in the Circuit Court for Baltimore City and, for one reason or another, all seven judges of the Maryland Court of Appeals *rejected* the State Officials' basis for revoking the petitioners' release status. All three men regained their liberty as a result of these proceedings. *A hearing made all the difference.*

This case also demonstrates how the qualified immunity doctrine can be misused. As a matter of fact, the State Officials knew that the petitioners had been released in accordance with Maryland law and pursuant to proper certificates of release issued by these very State Officials or their predecessors. As a matter of law, the State Officials are charged with knowledge of this Court's clear holdings in 1972 (*Morrissey*), 1973 (*Gagnon*), and thereafter. The State Officials should be required to answer for their decision to disregard these clear and important precedents.

The Due Process principles governing revocation of parole or similar release status are well-developed and long since settled. Neither the State Officials nor the lower courts should be permitted to ignore the controlling and long-standing authority from this Court that entitled the petitioners to hearings. Plainly, however, that is exactly what they did. As of May 1, 1998, the law, as articulated by this Court, clearly established that (a) Messrs. Henderson, Rexrode, and Calella had a protected liberty interest to continue their mandatory supervision release and, therefore, (b) they had a clearly established right to a hearing to challenge the State Officials' decision to revoke their release and incarcerate them.

CONCLUSION

This Court should grant the writ and reverse the judgment below. Petitioners are entitled to a trial to prove their claims.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

VINCENT HENDERSON; DARYELLE REXRODE; JOHN CALELLA, *Plaintiff-Appellant,* v. STUART O. SIMMS; RICHARD LANHAM, SR.; WILLIAM O. FILBERT, *Defendants-Appellees.*	No. 99-1706

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-99-949-S)

Argued: April 6, 2000

Decided: July 28, 2000

Before LUTTIG and WILLIAMS, Circuit Judges, and Gerald Bruce LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Luttig and Judge Lee joined.

COUNSEL

ARGUED: Douglas R.M. Nazarian, HOGAN & HARTSON, L.L.P., Baltimore, Maryland, for Appellants, Andrew Howard Baida, Assistant Attorney General, Baltimore, Maryland, for Appellees. **ON BRIEF:** Ralph S. Tyler, HOGAN & HARTSON, L.L.P., Baltimore, Maryland; Eugene J. Yannon, Bowie, Maryland, for Appellants, J. Joseph Curran, Jr., Attorney General of Maryland, Lawrence P. Fletcher-Hill, Assistant Attorney General, Baltimore, Maryland, for Appellees.

OPINION

WILLIAMS, Circuit Judge:

Appellants Vincent Henderson, Daryelle Rexrode, and John Calella filed a 42 U.S.C.A. § 1983 (West Supp. 1999) suit in the United States District Court for the District of Maryland against Appellees Stuart O. Simms, Richard A. Lanham, Sr., and William O. Filbert in their individual capacities. Appellants sought damages arising out of their summary arrests and reincarceration, pursuant to retake warrants for escapees, following their release from incarceration on mandatory supervision. The district court dismissed Appellants' suit on the ground of qualified immunity, reasoning that Appellees did not violate Appellants' clearly established constitutional rights under the Fourth or Fourteenth Amendment. We hold that Appellees' arrests of Appellants pursuant to retake warrants for escapees did not violate Appellants' Fourth Amendment rights. We further hold that Appellees did not violate Appellants' Fourteenth Amendment rights in

failing to provide Appellants a hearing to challenge their arrests and reincarceration because Appellees reasonably thought that Appellants were mistakenly released prisoners with no cognizable interest in remaining at liberty. We therefore affirm the district court's dismissal of Appellants' complaint.

I.

Because this case is on appeal from a district court's order dismissing Appellants' complaint, we take the following facts as alleged in the complaint as true. *See S.P. v. City of Takoma Park*, 134 F.3d 260, 264 (4th Cir. 1998). Vincent Henderson, Daryelle Rexrode, and John Calella were convicted in Maryland state court of violating various provisions of the Maryland criminal law. All three served their respective criminal sentences, less deductions for diminution credits earned, and were released from incarceration on "mandatory supervision," a release status similar to parole. Henderson was released on July 7, 1997. Rexrode was released on March 28, 1996. Calella was released on December 11, 1995. Each complied with the terms of his release from the time of his release through the filing of the instant complaint.

On March 9, 1998, the Court of Appeals of Maryland decided the case of *Beshears v. Wickes*, 706 A.2d 608 (1998). *Wickes* involved the interpretation of the Maryland statutes governing the calculation of sentence diminution credits. Sometime between March 9, 1998 and May 1, 1998, state officials Stuart O. Simms, Richard A. Lanham,

Sr., and William O. Filbert[1] decided that their understanding of the rule in *Wickes* should be applied to recalculate the statutory diminution credits of persons, including Appellants, who had been released prior to the decision in *Wickes*. Simms and Lanham, acting under color of state law, ordered that the release dates of Henderson, Rexrode, and Calella be recalculated. As a result of these recalculations, Simms and Lanham authorized and established new release dates for Appellants that fell far into the future.

Appellees then decided to implement their interpretation of *Wickes* by arresting and reincarcerating previously released persons, such as Appellants, whose revised, post-*Wickes* release dates had not yet arrived. Acting pursuant to Md. Ann. Code art. 27, § 682(d) (1996) (the Maryland retake-warrant statute),[2] Filbert executed

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[1] At the time of the complaint, Simms was the Secretary of the Maryland Department of Public Safety and Correctional Services, Lanham was the Commissioner of the Maryland Division of Correction, and Filbert was the Warden of the Maryland Reception, Diagnostic and Classification Center.

[2] Section 682(d) provides as follows:

> (1) The warden or superintendent of each institution or a designee of the warden or superintendent may issue retake warrants for the apprehension and return of escapees.
>
> (2) A copy of the retake warrant shall be forwarded to the office of the State's Attorney for the county from which the escape was made.
>
> (3) Any sheriff or police officer authorized to serve criminal process, to whom a warrant for the retaking of an escapee shall be delivered, is authorized and required to execute such warrant in accordance with

and issued warrants for the arrests of Henderson, Rexrode, and Calella. The warrants were each titled "Retake Warrant for Arrest and Detention of Escaped Prisoner," although Appellees had actual knowledge that none of Appellants had in fact escaped. In fact, the warrant specifically noted that it was being issued "as a result of a court decision requiring a recalculation of the offender's term of confinement" and would expire on the revised date recalculated for that prisoner. (J.A. at 19.) Appellees, acting under color of state law, ordered that Appellants be arrested pursuant to the § 682(d) warrants issued and signed by Filbert.

Pursuant to these § 682(d) warrants, Appellees directed and caused armed police officers to arrest each Appellant at his home or place of work on or about May 1, 1998, and then had each incarcerated. Appellees did not afford Appellants a hearing (either pre-arrest or post-arrest) to challenge the basis or legitimacy of their arrests or incarceration. Following his arrest, on May 8, 1998, Henderson filed a petition for writ of habeas corpus in the Circuit Court for Baltimore County [sic]. On May 14, the court granted the petition, denied Appellees' motion for a stay, and ordered Henderson released. On May 18, the Court of Appeals of Maryland granted Appellees' petition for certiorari review of the circuit court's order releasing Henderson and denied Appellees' motion for a

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> the directions contained therein. A sheriff or police officer making an arrest under this subsection shall promptly notify the Division of Correction of the arrest.

Md. Ann. Code art. 27, § 682(d) (1996).

stay. Appellees then released Rexrode and Calella from incarceration. Following briefing and argument, the Court of Appeals of Maryland affirmed the circuit court's grant of habeas relief to Henderson, on the ground that Appellees had misinterpreted the Court of Appeals's prior decision in *Wickes*. *See Secretary, Dep't of Pub. Safety & Correctional Servs. v. Henderson*, 718 A.2d 1150, 1157-58 (Md. 1998). As a result of Appellees' actions, Henderson was incarcerated from on or about May 1, 1998 to May 14, 1998 and Rexrode and Calella were incarcerated from on or about May 1, 1998 to May 18, 1998.

On April 6, 1999, Appellants filed suit under 42 U.S.C.A. § 1983 (West Supp. 1999) in the United States District Court for the District of Maryland seeking damages as a result of their arrests and reincarceration. The complaint alleged that Appellees violated Appellants' clearly established rights under the Fourth and Fourteenth Amendments by arresting and reincarcerating Appellants without probable cause and without a hearing following Appellees' determination that Appellants had been prematurely released from incarceration on mandatory supervision. Appellees filed a motion to dismiss. By memorandum opinion and order dated May 14, 1999, the district court granted Appellees' motion to dismiss the complaint in its entirety on the ground that Appellees were entitled to qualified immunity. The district court reasoned that Appellees' actions did not violate Appellants' clearly established procedural due process rights under the Fourteenth Amendment because Appellees "reasonably could have believed that [Appellants] had no protected liberty interest that demanded pre-deprivation notice and a hearing" and did not violate Appellants'

clearly established rights under the Fourth Amendment because Appellees "reasonably could have believed that escape from custody was the closest model for obtaining legal process to effect the retakes required by Maryland law, there being no statute of Maryland covering this unlikely situation." (J.A. at 117-18.) On May 19, 1999, Appellants filed a timely notice of appeal.

II.

Before us, Appellants make two arguments why the district court judgment should be reversed. First, Appellants argue that because Appellees knew that Appellants had not escaped, the retake warrants lacked probable cause and were invalid, and, therefore, Appellants' arrests violated their clearly established rights under the Fourth Amendment to be secure from unlawful arrest. Second, Appellants argue that because the Fourteenth Amendment has long required that a decision to revoke a former inmate's release status be accompanied by a corresponding opportunity to challenge the revocation, Appellees' denial of a hearing violated Appellants' clearly established rights under the Fourteenth Amendment. We review de novo a district court's grant of a motion to dismiss on the ground of qualified immunity. *See S.P. v. City of Takoma Park*, 134 F.3d 260, 265 (4th Cir. 1998).

"Qualified immunity is an accommodation by the courts to the conflicting concerns of, on one hand, government officials seeking freedom from personal monetary liability and harassing litigation and, on the other hand, injured persons seeking redress for the abuse of official power." *Hodge v. Jones*, 31 F.3d 157, 162 (4th Cir.

1994) (internal quotation marks omitted). To that end, qualified immunity protects government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether a government official is entitled to qualified immunity, "we must (1) identify the right allegedly violated, (2) determine whether the constitutional right violated was clearly established at the time of the incident, and (3) evaluate whether a reasonable offic[ial] would have understood that the conduct at issue violated the clearly established right." *S.P.*, 134 F.3d at 265. These steps are sequential; we " 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,' " before " 'proceed[ing] to determine whether that right was clearly established at the time of the alleged violation.' " *Wilson v. Layne*, 119 S. Ct. 1692, 1697 (1999) (quoting *Conn v. Gabbert*, 119 S. Ct. 1292, 1295 (1999)). Accordingly, we address Appellants' claims in turn, focusing first on whether Appellants' complaint has alleged a deprivation of their constitutional rights.

A.

Appellants' complaint contends that their arrests by Appellees pursuant to "escapee" warrants violated the Fourth Amendment. The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *see Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961), states in pertinent part that "[t]he right of the people to be secure in

their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause," U.S. Const. amend. IV. Subject to limited exceptions not relevant in this case,[3] the general rule is that "Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway v. New York*, 442 U.S. 200, 213 (1979). Probable cause, in turn, is "defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (internal quotation marks omitted). "Whether probable cause exists in a particular situation . . . always turns on two factors in combination: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). "Probable cause therefore could be lacking in a given case, and an arrestee's right violated, either because of an arresting officer's insufficient factual knowledge, or legal misunderstanding, or both." *Id.*

In this case, it is undisputed that Appellants were "seized" within the meaning of the Fourth Amendment when arrested pursuant to retake warrants. *See Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (holding that Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*"); *Dunaway*, 442 U.S. at

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[3] For example, in *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968), the Supreme Court held that the police may make a brief, on-the-spot stop on the street and a frisk for weapons based upon a reasonable suspicion that criminal activity is afoot.

207 (holding that petitioner was "seized" when he was taken involuntarily to the police station). Appellants contend that because they had not escaped, but rather had been released on mandatory supervision, the plain language of the Maryland retake-warrant statute did not authorize Appellees to issue retake warrants for Appellants' arrests. Appellants assert that as a consequence, the retake warrants were supported by no cause, let alone legally sufficient probable cause.

In response, Appellees contend that under Maryland law and law from other jurisdictions, prisoners erroneously released from incarceration hold the same status as escapees for purposes of their reincarceration. In support of this proposition, Appellees cite *Hopkins v. North*, 135 A. 367 (1926). In *Hopkins*, an individual who was sentenced to jail became ill and was released for treatment at a sanatorium by the sheriff upon order of a magistrate. *See id.* at 367-68. After the prisoner completed his treatment but refused to return to jail, the state's attorney filed a petition for a mandamus to compel the sheriff to arrest the prisoner and keep him in jail until he had served the remainder of his sentence. *See id.* at 368. In addressing this issue, the Court of Appeals of Maryland first held that "[t]he decided weight of authority, and, in our opinion, the better reasoned cases, hold that, where a prisoner secures his liberty through some illegal or void order, it is to be treated as an escape, and he can be retaken and compelled to serve out his sentence." *Id.* After noting that the magistrate's order and the sheriff's action in releasing the prisoner in the first place were unauthorized and illegal, and that the prisoner was given

his liberty upon the understanding that when he recovered from his illness he would return to jail and serve the unexpired portion of his sentence, the Court concluded that "under the circumstances of this case [the prisoner] must be treated as having escaped, and so is subject to arrest, and that upon his arrest he can be compelled to serve the remainder of his sentence." *Id.*

The Maryland Court of Appeals's decision in *Hopkins* supports Appellees' position that no violation of Appellants' Fourth Amendment rights occurred in this case. Because Appellants do not challenge Appellees' substantive decision to apply *Wickes* retroactively, but only challenge the means by which that decision was carried out, including, *inter alia*, the execution and issuance of retake warrants for Appellants' arrests, it follows that Appellants do not challenge the reasonableness of Appellees' belief that Appellants were released "through some illegal or void order." Appellants cite no subsequent Maryland case, and we could find none, suggesting that Maryland courts would depart from *Hopkins*. In light of this dearth of dispositive case law, we believe that the common-law definitions of "escape" and "escapee" in *Hopkins* are the best indication of how the terms "escape" and "escapees" in the Maryland retake-warrant statute would be construed today by a Maryland court. *See Lorillard v. Pons*, 434 U.S. 575, 583 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law . . . they are presumed to have been used in that sense unless the context compels to the contrary." (alteration in original) (internal quotation marks omitted)). Accordingly, because *Hopkins* instructs us that a mistakenly released prisoner is to be

treated under Maryland law as an escapee for purposes of his reincarceration, we conclude that Appellees did not violate Appellants' Fourth Amendment rights to be free from unreasonable seizure when they arrested Appellants pursuant to retake warrants for escapees. Appellees, therefore, are entitled to dismissal of Appellants' Fourth Amendment claim. *See Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (en banc).

Even assuming *arguendo* that Appellees' arrest of Appellants violated Appellants' Fourth Amendment rights to be free from unreasonable seizure, we are convinced that these rights were not clearly established at the time of the seizures. This Court has held that the Fourth Amendment right to be arrested only on probable cause is clearly established. *See Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996). If the test of clearly established law is applied at this level of generality, however, plaintiffs alleging a Fourth Amendment violation could "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see also S.P.*, 134 F.3d at 266 (stating principle in mental health seizure context). Appellants must therefore allege facts "demonstrating that the established contours of probable cause were sufficiently clear at the time of the seizure such that the unlawfulness of [Appellees'] actions would have been apparent to reasonable offic[ials]." *Id.* In other words, the appropriate question is whether a reasonable state official could have believed that issuing retake warrants pursuant to the Maryland retake-warrant statute for the arrests and reincarceration of individuals erroneously released on mandatory supervision was lawful, in light of clearly

established law and the information Appellees possessed. *Cf. Wilson*, 119 S. Ct. at 1700.

Applying these principles to this case, it was clearly not unreasonable for a Maryland state official in May 1998 to have believed that executing and issuing retake warrants pursuant to § 682(d) for the arrests and reincarceration of individuals they reasonably believed to have been erroneously released was lawful. First, because there is no provision in the Annotated Code of Maryland specifically providing for the retake of prisoners erroneously released, and given that Maryland's highest court had stated in *Hopkins* that prisoners who gained their liberty "through some illegal or void order" had the status of escapees, it was not unreasonable for Appellees to believe that the means provided for retaking escapees applied to retaking mistakenly released prisoners as well. Second, Appellants cite no judicial opinions, and we can find none, stating that it is unlawful to use an escapee warrant to arrest and reincarcerate erroneously released prisoners. *See id.* (relying in part upon lack of judicial opinions on whether media entrances into a home violated Fourth Amendment to justify finding that the right to be free from such entrances was not clearly established). Although Appellants contend that Appellees could have obtained the warrants "the old-fashioned lawful way," we decline to impose liability on Appellees based upon their failure successfully to predict the course of the law. Accordingly, even if Appellants' Fourth Amendment rights in this particular context were cognizable, these rights were not sufficiently clear at the time of Appellants' arrests to notify reasonable state officials in Appellees' position that their conduct was unlawful,

thus entitling Appellees to qualified immunity on Appellants' Fourth Amendment claim.

B.

Second, Appellants argue that their reincarceration without a hearing to challenge the basis for the reincarceration violated their rights not to be deprived of liberty without due process of law under the Fourteenth Amendment. The Fourteenth Amendment provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (internal citation omitted). An individual claiming a liberty or property interest protected by the Fourteenth Amendment "must have a legitimate claim of entitlement to it." *Id.* "Protected liberty interests 'may arise from two sources – the Due Process Clause itself and the laws of the States.' " *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)).

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court addressed the question of whether the requirements of procedural due process applied to parole revocations. *See id.* at 481. In answering that question in the affirmative, the Court first noted that "the liberty of a parolee, although indeterminate, includes many of the

core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* at 482. Buttressing the parolee's interest in liberty is the society's interest "in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole" and its interest "in treating the parolee with basic fairness." *Id.* at 484. Accordingly, the Supreme Court held that due process required a preliminary hearing at the time of the parolee's arrest and detention "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions," *id.* at 485, and a revocation hearing prior to the final decision on revocation and within a reasonable time after the parolee is taken into custody in which the parolee has "an opportunity to be heard and to show, if he can, that he did not violate the [parole] conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation," *id.* at 488.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court extended the two-hearings requirement set forth in *Morrissey* to the revocation of probation. *See id.* at 482. This Court subsequently extended *Morrissey* and *Gagnon* to require a hearing in the case of a pardon revocation. *See Pope v. Chew*, 521 F.2d 400, 404-05 (4th Cir. 1975). Finally, in *United States v. Copley*, 978 F.2d 829, 831 (4th Cir. 1992), this Court extended the due process protections enunciated in *Morrissey* and *Gagnon* to revocation of supervised release. In light of these precedents, Appellants argue, the lack of any hearing at all to challenge the

basis of their arrests and reincarceration violated their rights to due process.

Appellants' argument overlooks one simple fact: by their own admission, their case "does not challenge [Appellees'] substantive decision to apply *Wickes* retroactively" but rather challenges "the lawfulness of [Appellees'] deliberate decision to carry out their retroactive decision of *Wickes*," by, *inter alia*, denying Appellants an opportunity to challenge Appellees' decision to have them arrested and incarcerated. (Appellants' Br. at 16.) Appellants therefore do not challenge the reasonableness of Appellees' misinterpretation of *Wickes*, and by implication, the reasonableness of Appellees' belief that Appellants had been mistakenly released. A prisoner who is mistakenly released does not have a protected liberty interest because, unlike a parolee, he does not have a "legitimate claim of entitlement" to freedom. *See Campbell v. Williamson*, 783 F. Supp. 1161, 1164 (C.D. Ill. 1992); *see also McKellar v. Arizona State Dep't of Corrections*, 566 P.2d 1337, 1339 (Ariz. 1977) (holding that state's seizure and reincarceration of mistakenly released prisoner without a hearing did not violate due process). With no liberty interest to protect, there is no violation of due process and no need for the pre-detention hearings contemplated by *Morrissey* and its progeny. Because Appellants' complaint failed to show that they suffered a deprivation of due process, Appellees are entitled to dismissal of Appellants' Fourteenth Amendment claim. *See Jenkins*, 119 F.3d at 1160.

Even assuming *arguendo* that a mistakenly released prisoner possesses a liberty interest and the due process right to challenge his arrest at a preliminary hearing and

at a hearing just prior to reincarceration, Appellees would still be entitled to qualified immunity on Appellants' Fourteenth Amendment claim because this right was not clearly established at the time of Appellants' arrests. At the time of Appellants' arrests, this Court recognized that the due process requirements of *Morrissey* applied to revocations of pardons and revocations of supervised release. Because the liberty interest of a mistakenly released prisoner differs greatly from the liberty interest of a prisoner who has been pardoned or a prisoner who is on supervised release, it does not automatically follow that a mistakenly released prisoner is entitled to a hearing to challenge his arrest and reincarceration. *See Copley*, 978 F.2d at 831 ("Logic would extend this protection [enunciated in *Morrissey* and *Gagnon*] to hearings to revoke supervised release."); *Pope*, 521 F.2d at 404 ("The Commonwealth has not suggested, and we have been unable to imagine, how the liberty interests of one who is free on conditional pardon differ from one who is free on parole or probation."). Thus, Appellants' Fourteenth Amendment rights in this particular context, even if recognized, were not sufficiently clear at the time of their arrests to notify reasonable state officials in Appellees' position that their denial of a hearing to Appellants was unlawful.

III.

In sum, we hold that Appellees did not violate Appellants' rights under the Fourth Amendment and that Appellants had no protected liberty interest under the

Fourteenth Amendment. We therefore affirm the district court's dismissal of Appellants' complaint.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VINCENT HENDERSON	:	
DARYELLE REXRODE	:	CIVIL NO.
JOHN CALELLA	:	S 99-949
V.	:	
	:	
STUART O. SIMMS	:	
RICHARD A. LANHAM, SR.	:	
WILLIAM O. FILBERT	:	

MEMORANDUM OPINION
(Filed May 14, 1999)

In *Beshears v. Wickes*, 349 Md. 1 (1998), the Court of Appeals of Maryland had occasion to interpret a Maryland statute granting "diminution credits" to Maryland prison inmates. Based upon the opinion of the Court of Appeals in that case, the defendants, all Maryland public safety officials, determined that a number of inmates who had been released on the basis of credits that were "incorrectly" calculated were not entitled to be at liberty, but should be reincarcerated. Those inmates, among whom were the three plaintiffs in this case, were arrested and reincarcerated through "retake orders." *See Secretary, Dep't. of Pub. Safety and Correctional Servs. v. Henderson*, 351 Md. 438, 447-48 (1998). In *Henderson*, the Court of Appeals noted that the sole reason for the reincarceration of the plaintiffs (and some 50 others) was "the [Correctional Services] Division's recalculation of . . . diminution credits in accordance with . . . *Wickes*. . . . " *Id.* The *Henderson* opinion resolved an appeal from an order

granting habeas corpus relief to plaintiff Henderson following his retake. In *Henderson*, the Court of Appeals noted that "[u]nfortunately, we used some language in *Wickes* that went beyond what was necessary to the decision." *Id.* at 445. The court concluded that "the expanded 'holding' in Wickes, precluding the Division from applying § 700 as it is written . . . , was not necessary in order to reach the result in *Wickes*." *Id.* at 451. The *Henderson* majority went on to hold that, in Mr. Henderson's case, there had been an error in the actual recalculation of his sentence by the Division, "understandable in light of the noted language used in *Wickes*, [which] deprived[d] [sic] him of the liberty to which he was statutorily entitled." *Id.* at 452. Thus, the Court of Appeals affirmed the grant of habeas corpus relief to Mr. Henderson. Four of that court's seven judges were with the majority, which did not undertake any constitutional analysis, confining itself to issues of Maryland statutory interpretation.

Three of the seven judges of the Court of Appeals joined in a concurring and dissenting opinion, observing, in pertinent part, that the plaintiff had been "deprived of his liberty and reincarcerated by the Division of Correction without any prior notice and without being given any opportunity to contest the Division's unilateral action. This is improper." 351 Md. at 459 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). Apparently relying upon this language, Mr. Henderson and two others similarly situated have brought the present action for damages against various individuals involved in their reincarceration, invoking this Court's jurisdiction under 42 U.S.C. § 1983.

The defendants have moved to dismiss, on the ground of qualified immunity. The plaintiffs oppose dismissal. No oral hearing is needed. Local Rule 105.6, D.Md.

The Supreme Court has held that a motion raising the defense of qualified immunity is to be decided at an early stage in the litigation, so that a defendant who is entitled thereto need not participate in litigation from which he is immune. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

There is no doubt, in this Court's judgment, that the defendants are entitled to qualified immunity (there being no factual dispute, the Court assuming for the present purposes the truth of the facts set forth in the complaint) as a matter of law.

In order to be entitled to qualified immunity, public officials must show that their actions, objectively viewed, did not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow, supra* at 815-16.

The first question in a qualified immunity inquiry is whether the plaintiff has identified a specific constitutionally-protected right that was violated. *See, e.g., Wagner v. Wheeler*, 13 F.3d 86 (4th Cir. 1993). In this case, the plaintiffs apparently do not rely upon the purported substantive due process right of an erroneously released parolee to remain on release, recently recognized by a panel opinion of the Fourth Circuit, *viz., Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999). The panel decision in *Hawkins* has been vacated, see 1999 WL 173607 (4th Cir. Mar. 26, 1999), and, of course, since it predated the defendants' conduct anyway, it certainly could not constitute

"clearly established" law of which they should have known. *See, e.g., Hodge v. Jones*, 31 F.3d 157 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994). Rather, plaintiffs rely primarily upon the *Morrissey v. Brewer* procedural due process right discussed in the minority opinion in the Court of Appeals' decision in Mr. Henderson's habeas corpus case.

In light, however, of the unique circumstances confronting the Division of Correction in the aftermath of *Wickes*, as fully and repeatedly appreciated by the majority of the Court of Appeals in *Henderson*, and in light of the fact that *Morrissey* arose in an entirely different context than the present case, *viz.*, a parole revocation for cause rather than for legal error that, according to the state's highest court, rendered the prisoner's release void *ab initio*, this Court holds that the plaintiffs' rights to continued liberty and/or to procedural due process under the unique circumstances of this case were not so clearly established that a reasonable official should have known of them and that the conduct alleged here violated them.

The ultimate determination in a qualified immunity case must be whether there is a legitimate question as to whether what the official did constituted a violation of constitutional rights, *see Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987), *abrogated on other grounds, Horton v. California*, 496 U.S. 128, 130 (1990), giving due regard to the degree of latitude that should be accorded to judgments of state officials in executing their duties. *See Torchinsky v. Siwinski*, 942 F.2d 257 (4th Cir. 1991). Indeed, in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the Supreme Court made it clear that qualified immunity, at bottom, is to be

granted where officials have acted "reasonably, but mistakenly. . . . "

Under these standards, there could hardly be a clearer case for concluding that state officials acted "reasonably, but mistakenly." They were simply making a good faith effort to put into effect what the Court of Appeals later characterized as its own legally erroneous interpretation of Maryland law, without any direction from the Court of Appeals as to how its opinion was to be put into practical effect. As the majority opinion in *Henderson* recognizes over and over, the officials' actions were "understandable" in light of its own *Wickes* decision. Neither *Morrissey* nor any other case clearly establishes that defendants needed to resort to judicial process in executing the *Wickes* holding when returning erroneously released prisoners to custody. This Court acknowledges the *Henderson* minority's reference to due process rights and *Morrissey*, but that reference was *dictum*. It was not made with a studied appreciation of the differences between the situation in *Morrissey* (where the plaintiff was unquestionably enjoying a legitimate period of liberty between his parole release and its revocation) and the situation confronting these defendants after *Wickes* (under which plaintiffs were not entitled to release *ab initio*), or with all the considerations relevant to qualified immunity in mind.

This is not to say that the gist of the plaintiffs' argument against qualified immunity lacks surface appeal. They argue, essentially, that any reasonable officer knows that a person cannot be deprived of his liberty without due process of law, including notice and an

opportunity for a hearing, or be arrested without probable cause. In their ordinary application to a person at liberty on the street, these fundamental principles certainly are well known to any reasonable officer of the state. (If plaintiffs' argument were to prevail to its utmost, there could hardly ever be a grant of qualified immunity in any due process or unreasonable seizure case. That is, obviously, not the case, as there are many such grants made and even affirmed on appeal.)

What the plaintiffs' argument primarily fails to appreciate is that, to be entitled to procedural due process protection, the liberty interest must first be a "protected" one, which is usually an inquiry based on state law. *See, e.g., Paoli v. Lally*, 812 F.2d 1489 (4th Cir.), *cert. denied*, 484 U.S. 864 (1987). Here, faced with state law as it was declared to them by the highest court in Maryland at the time of the retakes, the officers certainly reasonably could have believed that the plaintiffs had no protected liberty interest that demanded pre-deprivation notice and a hearing. As to the fact that the officers used a procedural mechanism for retake that was not precisely suited for the occasion (giving rise to the argument that there was no probable cause to believe the plaintiffs had "escaped"), the fact of the matter is that the situation they were faced with was truly *sui generis*, and they reasonably could have believed that escape from custody was the closest model for obtaining legal process to effect the retakes required by Maryland law, there being no statute of Maryland covering this unlikely situation. Again, the Court keeps in mind that the bottom-line inquiry is not whether there has been a mistake by officers, but whether that mistake is one for which they should stand trial in a

suit for damages. *Anderson*, 483 U.S. at 641. Their mistake is not one for which these officials should be made to stand trial.

For the reasons stated, an Order will be entered separately, granting the defendants' motion to dismiss, as the present case is barred by qualified immunity.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

Dated: May 14th 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VINCENT HENDERSON	:	
DARYELLE REXRODE	:	CIVIL NO.
JOHN CALELLA	:	S 99-949
V.	:	
	:	
STUART O. SIMMS	:	
RICHARD A. LANHAM, SR.	:	
WILLIAM O. FILBERT	:	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 14th day of May, 1999, by the Court, ORDERED:

1. That the defendants' motion to dismiss BE, and it hereby IS, GRANTED;

2. That this case BE, and it hereby IS, DISMISSED, as barred by qualified immunity; and

3. That the Clerk of Court mail copies hereof to counsel for the parties.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

VINCENT HENDERSON,
29552 Jennifer Drive
Mechanicsville, Maryland
20659

DARYELLE REXRODE,
420 Beach Road
Arnold, Maryland 21012

JOHN CALELLA,
3510 Claremont Street
Baltimore, Maryland 21224

Plaintiffs,

v.

STUART O. SIMMS,
Serve on:
Stuart O. Simms
Maryland Department of
Public Safety and
Correctional Services
300 E. Joppa Road,
Suite 1000
Towson, Maryland 21286

RICHARD A. LANHAM,
SR.,
Serve on:
Richard A. Lanham, Sr.
12803 Manor Rd.
Glen Arm, Maryland 21057

Civil Action No. CCB 99 CV949

PLAINTIFFS' COMPLAINT JURY TRIAL DEMANDED

(Filed Apr. 6, 1999)

WILLIAM O. FILBERT,
Serve on:
William O. Filbert
Maryland Reception,
Diagnostic
and Classification Center
550 East Madison Street
Baltimore, Maryland 21202

Defendants.

Nature of Action

1. This is an action for violations of federal constitutional rights in which plaintiffs seek compensatory and punitive damages under 42 U.S.C. § 1983. The defendants, at all times acting under color of state law, knowingly, intentionally, and deliberately violated plaintiffs' clearly established rights under the Fourth and Fourteenth Amendments to the United States Constitution. In violation of long-standing Fourth and Fourteenth Amendment decisions of the Supreme Court of the United States, defendants personally authorized, ordered, and directed that plaintiffs be arrested without probable cause and pursuant to unlawful warrants *and* defendants personally revoked plaintiffs' "release status" and incarcerated plaintiffs without any hearing or other semblance of due process of law.

2. Before the defendants wrongfully caused them to be reincarcerated, all plaintiffs had been lawfully released from state incarceration on "mandatory supervision release" according to the law and regulations governing at the time. All plaintiffs complied with the terms of their release at all times thereafter. Nevertheless, all plaintiffs

were unlawfully arrested on warrants for "escape" even though defendants had actual knowledge that none of them had, in fact, escaped. Plaintiffs were then unlawfully incarcerated for two or more weeks. Plaintiffs were released from incarceration only after one of the plaintiffs (Vincent Henderson) obtained a writ of *habeas corpus* and defeated defendants' effort to stay that judgment. *See generally Secretary, Department of Public Safety and Correctional Services v. Henderson*, 351 Md. 438 (1998). Each defendant consciously and deliberately disregarded the facts and the law and violated plaintiffs' clearly established federal constitutional rights. Accordingly, each defendant is liable to each plaintiff for compensatory and punitive damages in amounts to be determined at trial, plus fees and costs.

Jurisdiction and Venue

3. This complaint alleges violations of plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). Venue is proper in this district as defendants reside in this district and defendants' unlawful actions occurred in this district. 28 U.S.C. § 1391.

Parties

4. Plaintiff Vincent Henderson ("Henderson") is a citizen of the United States and a resident of St. Mary's County, Maryland.

5. Plaintiff Daryelle Rexrode ("Rexrode") is a citizen of the United States and a resident of Anne Arundel County, Maryland.

6. Plaintiff John Calella ("Calella") is a citizen of the United States and a resident of Baltimore City, Maryland.

7. At all times relevant to this action, defendants Stuart O. Simms ("Simms"), Richard A. Lanham, Sr. ("Lanham"), and William O. Filbert ("Filbert") acted under color of and asserted authority under state law as, respectively, the Secretary of the Maryland Department of Public Safety and Correctional Services (Simms), the Commissioner of the Maryland Division of Correction (Lanham), and the Warden of the Maryland Reception, Diagnostic and Classification Center (Filbert). Defendants Simms, Lanham, and Filbert are sued individually because each and all of them, acting pursuant to and under color of state law, violated plaintiffs' clearly established federal constitutional rights.

Allegations of Fact

8. Plaintiffs Henderson, Rexrode, and Calella (at times referred to herein collectively as "plaintiffs") each were convicted in the state courts of Maryland of violating various provisions of the Maryland criminal law and each were sentenced to terms of incarceration for their respective crimes. All three plaintiffs served their respective criminal sentences, less allowed deductions for statutory diminution credits (*e.g.*, good time, education, and work credits), and were released on "mandatory supervision," a release status closely akin to parole. Notwithstanding the fact that each plaintiff paid his debt to

society and was lawfully released from incarceration, defendants Simms, Lanham, and Filbert (at times referred to herein collectively as "defendants") wrongfully, illegally and unconstitutionally had plaintiffs arrested, revoked plaintiffs' release status, and had plaintiffs reincarcerated.

9. Plaintiff Henderson was released from incarceration on mandatory supervision on or about July 7, 1997, having then served his full sentence less the statutory sentence diminution credits to which he was entitled.

10. Plaintiff Rexrode was released from incarceration on mandatory supervision on or about March 28, 1996, having then served his full sentence less the statutory diminution credits to which he was entitled.

11. Plaintiff Calella was released from incarceration on mandatory supervision on or about December 11, 1995, having then served his full sentence less the statutory diminution credits to which he was entitled.

12. On March 9, 1998, the Maryland Court of Appeals decided the case of *Beshears v. Wickes*, 349 Md. 1 (1998) (*"Wickes"*). *Wickes* involved the interpretation of the Maryland statutes governing the calculation of sentence diminution credits. Sometime between the March 9, 1998 decision in *Wickes* and May 1, 1998 – a period of seven weeks – defendants Simms, Lanham, and Filbert (perhaps acting with others whose identity, as of this filing, is unknown to plaintiffs) decided that their understanding of the rule in *Wickes* should be applied to recalculate the statutory diminution credits *even of persons, including plaintiffs, who had been released from incarceration prior to the decision in Wickes.*

13. Defendants neither sought nor obtained any guidance or authorization from any court to support their harsh and retroactive interpretation of *Wickes*.

14. Sometime between March 9 and May 1, 1998, defendants Simms and Lanham, acting under color of the state laws governing jurisdiction over correctional services and formerly incarcerated persons on mandatory release status and parole, authorized, ordered, and directed that the release dates of plaintiffs Henderson, Rexrode, and Calella (as well as others who had also been released prior to *Wickes*) be recalculated.

15. As a result of the recalculations ordered by defendants Simms and Lanham, Simms and Lanham established and authorized new release dates for plaintiffs Henderson, Rexrode, and Calella. Defendants set a release date of July 3, *2002* for plaintiff Henderson, who had been released on July 7, 1997, approximately eight months prior to the decision in *Wickes*. Defendants also set extended or prospective release dates for plaintiffs Rexrode and Calella, both of whom also had been released prior to the decision in *Wickes*. Thus, defendants Simms and Lanham, acting under color of state law, authorized new, extended, and prospective release dates for all three plaintiffs even though all three plaintiffs had been released prior to *Wickes* and were at liberty (subject to certain conditions that they had satisfied).

16. Having set extended or prospective release dates for plaintiffs who had been released prior to *Wickes* and who were at liberty, defendants Simms, Lanham, and Filbert then decided to arrest and reincarcerate plaintiffs Henderson, Rexrode, and Calella. When defendants made

this decision, defendants had no information or any basis to believe that any of the three plaintiffs had violated their respective terms of release, nor had any of the plaintiffs been cited for any violation, nor had any administrative or other tribunal determined that any of the plaintiffs had committed any such violation. Thus, defendants made a decision to arrest and reincarcerate the three plaintiffs with full knowledge that plaintiffs were released from incarceration in the ordinary course and pursuant to defendants' duly issued "mandatory supervision release certificate" *and* that plaintiffs had not violated the terms of their release.

17. Acting under color of state law, defendant Filbert issued and signed warrants for the arrest of plaintiffs Henderson, Rexrode, and Calella. The warrants so issued were titled "retake warrant for arrest and detention of escaped prisoner." Attached hereto as Exhibit A and incorporated herein by reference is a copy of the arrest warrant issued for plaintiff Henderson. Except for the identity of the person to be arrested, plaintiffs believe and allege that the warrants defendant Filbert issued and signed for plaintiffs Rexrode and Calella were identical to the warrant he issued and signed for Henderson (Exhibit A).

18. As stated on the face of the warrant (Exhibit A), defendant Filbert's sole "authority" for issuing a warrant for the arrest of plaintiffs Henderson, Rexrode, and Calella was Maryland Annotated Code, Article 27, § 682(d) ("§ 682(d)"). By its unambiguous terms, § 682(d) only authorizes defendant Filbert, as a warden, to "issue retake warrants for the apprehension and return of *escapees*" (emphasis added). When defendant Filbert

issued and signed the § 682(d) warrants for the arrest of plaintiffs Henderson, Rexrode, and Calella, he acted under color of state law (§ 682(d)) and he abused his authority under that state law because he knew that, in fact, plaintiffs had not escaped from custody and were *not* "escapees" as defined and required by § 682(d).

19. Upon information and belief, plaintiffs allege that defendants Simms and Lanham were personally involved in Filbert's plan, intention, and action to invoke and abuse the limited authority conferred by § 682(d) to issue warrants for the arrest of "escapees." Upon information and belief, plaintiffs allege that (a) defendants Simms and Lanham had constructive and actual knowledge that their subordinate (defendant Filbert) planned, intended, and did issue and sign § 682(d) warrants for plaintiffs' arrest; *and* (b) defendants Simms and Lanham had actual knowledge that none of the plaintiffs were, in fact, "escapees"; *and* (c) defendants Simms and Lanham had actual knowledge of and, indeed, are legally charged with knowledge of the terms of and, therefore, the limited authority granted by § 682(d); *and* (d) defendants Simms and Lanham had the power, duty, obligation, authority, and responsibility to stop and prevent their subordinate (defendant Filbert) from abusing his limited authority under § 682(d); *and* (e) defendants Simms and Lanham failed to discharge their duty and obligation to prevent their subordinate (Filbert) from abusing his limited authority under § 682(d). (Discovery will be conducted to establish the scope and extent of the direct involvement of defendants Simms and Lanham in all matters relating to the issuance of the unlawful § 682(d)

warrants, including whether Simms and Lanham, as Filbert's superiors, or perhaps *their* superiors, personally ordered and directed Filbert to issue the unlawful § 682(d) warrants.)

20. In the state court *habeas corpus* proceedings involving plaintiff Henderson, defendants' counsel stated that "[u]nfortunately, I'm told by the counsel for Division of Corrections there is only one type of warrant and this [the § 682(d) retake warrant for escapees] is it. There just aren't any other types." (Tr. May 12, 1998, at 28:7-10.) That "explanation" ignores probable cause-based arrest warrants routinely used by police officers and approved by judicial officers and underscores defendants' manifest deliberate indifference.

21. Defendants Simms, Lanham, and Filbert had no probable cause to arrest plaintiffs Henderson, Rexrode, and Calella as defendants had no trustworthy information upon which to base a reasonable belief that the only offense charged in the arrest warrant – escape – and the only charge for which defendant Filbert was authorized to issue an arrest warrant – escape – had been committed by any of the plaintiffs. *Indeed, the defendants had actual knowledge that none of the plaintiffs had escaped.* Notwithstanding the total absence of probable cause, defendants Simms, Lanham, and Filbert, acting under color of state law, authorized, ordered, and directed that plaintiffs Henderson, Rexrode, and Calella be arrested pursuant to unlawful § 682(d) warrants issued and signed by defendant Filbert (Exhibit A).

22. Defendants Simms, Lanham, and Filbert, acting under color of state law, authorized, ordered, and

directed that the unlawful § 682(d) warrants be executed and, accordingly, plaintiffs Henderson, Rexrode, and Calella were each detained, arrested, and incarcerated on or about May 1, 1998.

23. On or about May 1, 1998, plaintiff Henderson was arrested by armed police officers at his home. The warrant for this arrest is attached as Exhibit A. Henderson was immediately denied his liberty and incarcerated under the control of defendants Simms, Lanham and Filbert.

24. On or about May 1, 1998, plaintiff Rexrode was arrested by armed police officers at a construction job site where he was working. The form of warrant for this arrest is attached as Exhibit A. Rexrode was immediately denied his liberty and incarcerated under the control of defendants Simms, Lanham, and Filbert.

25. On or about May 1, 1998, plaintiff Calella was arrested by armed police officers at his home. The form of warrant for this arrest is attached as Exhibit A. Calella was immediately denied his liberty and incarcerated under the control of defendants Simms, Lanham, and Filbert.

26. Defendants Simms, Lanham, and Filbert deliberately decided to have plaintiffs arrested pursuant to an unlawful warrant and without probable cause in conscious disregard of plaintiffs' clearly established federal constitutional rights under the Fourth and Fourteenth Amendments. *See, e.g., Dunaway v. New York*, 442 U.S. 200 (1979).

27. Defendants Simms, Lanham, and Filbert, acting under color of state law, revoked plaintiffs' release status, had plaintiffs arrested, and incarcerated plaintiffs without any prior notice or opportunity for any hearing (either pre-arrest or post-arrest) to challenge, *inter alia*, (a) the lawfulness of the arrest warrant, (b) the reasons for their respective arrests, including an opportunity to show that all three plaintiffs had complied with the terms of their release and, therefore, that defendants could not lawfully revoke plaintiffs' release status, and (c) the lawfulness of defendants' retroactive application of *Wickes* as supposedly justifying plaintiffs' arrest and reincarceration.

28. Defendant Simms, Lanham, and Filbert deliberately decided to subject plaintiffs to the grievous loss of their liberty, to revoke their release status, and to reincarcerate them without any due process of law in violation of plaintiffs' clearly established federal constitutional rights under the Fourteenth Amendment. *See Morrissey v. Brewer*, 408 U.S. 471 (1972).

29. Following his arrest, plaintiff Henderson obtained counsel who, on May 8, 1998, filed a petition for a writ of *habeas corpus* on his behalf in the Circuit Court for Baltimore City. On May 14, the court granted the petition and ordered Henderson's release. Henderson was released from incarceration on May 14 after the trial court denied defendants' motion for a stay.

30. Defendants appealed the trial court's grant of *habeas* relief to Henderson and sought *certiorari* review in the Maryland Court of Appeals. Defendants also sought a stay in the Court of Appeals even though Henderson was

the only plaintiff in the case, he had been released, and defendants did not seek authorization to rearrest him pending appellate review. On May 18, 1998, defendants' *certiorari* petition was granted and their motion for stay was denied. Defendants then released plaintiffs Rexrode and Calella from incarceration. Following briefing and argument, defendants' appeal was rejected in its entirety and the trial court's grant of *habeas corpus* relief was affirmed. *See Henderson*, 351 Md. 438.

31. As a direct result of defendants' deliberate indifference to his constitutional rights, plaintiff Henderson was incarcerated from on or about May 1 to May 14, 1998. Henderson was harmed and damaged by defendants' deliberate and unlawful conduct, such damage including the denial of Fourth and Fourteenth Amendment rights to which he is entitled as a citizen of the United States, the loss of his liberty without due process of law, and the loss of income and employment opportunities.

32. As a direct result of defendants' deliberate indifference to his constitutional rights, plaintiff Rexrode was incarcerated from on or about May 1 to on or about May 18, 1998. Rexrode was harmed and damaged by defendants' deliberate and unlawful conduct, such damage including the denial of Fourth and Fourteenth Amendment rights to which he is entitled as a citizen of the United States, the loss of his liberty without due process of law, and the loss of income and employment opportunities.

33. As a direct result of defendants' deliberate indifference to his constitutional rights, plaintiff Calella was incarcerated from on or about May 1 to on or about May

18, 1998. Calella was harmed and damaged by defendants' deliberate and unlawful conduct, such damage including the denial of Fourth and Fourteenth Amendment rights to which he is entitled as a citizen of the United States, the loss of his liberty without due process of law, and the loss of income and employment opportunities.

First Cause of Action

(All defendants' Fourth and Fourteenth Amendment violations)

34. Plaintiffs incorporate by reference ¶¶ 1-33.

35. Defendants Simms, Lanham, and Filbert violated plaintiffs' clearly established rights under the Fourth and Fourteenth Amendments to be free from unlawful arrest when defendants, with deliberate indifference and conscious disregard for the facts, the law, and plaintiffs' rights, personally authorized, ordered, and directed plaintiffs' arrest pursuant to unlawful § 682(d) warrants for "escapees."

36. The warrant authorized and used by defendants to arrest plaintiffs was factually and constitutionally defective, all defendants knew of these defects, and defendants proceeded to arrest plaintiffs notwithstanding their knowledge. Defendants had actual as well as constructive knowledge that, in fact, plaintiffs had *not* escaped and that, in fact, plaintiffs were lawfully released from incarceration pursuant to properly issued "mandatory supervision release certificate[s]." Thus, defendants had no cause, and plainly no legally sufficient probable

cause, to authorize, order, and direct that plaintiffs be arrested as "escapees."

37. Despite the absence of any lawful probable cause or a legally valid arrest warrant, defendants Simms, Lanham, and Filbert personally authorized, ordered, and directed that plaintiffs be arrested and then incarcerated in violation of plaintiffs' rights under the Fourth and Fourteenth Amendments.

38. Each defendant is personally liable to each plaintiff for compensatory and punitive damages for the harm and damage which each defendant caused each plaintiff in amounts to be determined at trial.

Second Cause of Action

(Defendant Filbert's Fourth and Fourteenth Amendment violations)

39. Plaintiffs incorporate by reference ¶¶ 1-38.

40. Defendant Filbert personally issued and signed the § 682(d) "retake warrant for escaped prisoner[s]" (example attached as Exhibit A) pursuant to which all three plaintiffs were arrested. Defendant Filbert issued and signed the warrant as to each plaintiff with actual as well as constructive knowledge that, in fact, none of the plaintiffs had escaped and that, in fact, all of the plaintiffs were lawfully released from incarceration. Thus, defendant Filbert acted with deliberate indifference and with conscious disregard of the facts, the law, and plaintiffs' clearly established rights under the Fourth and Fourteenth Amendments to be free of unlawful arrest as he knew he had no cause, and plainly no legally sufficient

probable cause, to invoke his limited authority under § 682(d). Nevertheless, defendant Filbert personally issued and signed the warrants pursuant to which each and all of the three plaintiffs were arrested and then incarcerated.

41. Defendant Filbert's intentional and deliberate conduct violated plaintiffs' clearly established rights under the Fourth and Fourteenth Amendments.

42. Defendant Filbert is personally liable to each plaintiff for compensatory and punitive damages for the harm and damage which Filbert caused each plaintiff in amounts to be determined at trial.

Third Cause of Action

(All defendants' Fourteenth Amendment violations)

43. Plaintiffs incorporate by reference ¶¶ 1-42.

44. Defendants Simms, Lanham, and Filbert violated plaintiffs' clearly established rights under the Fourteenth Amendment when defendants unilaterally and without any hearing or other semblance of due process of law (and pursuant to an unlawful arrest warrant) revoked plaintiffs' release status and incarcerated them.

45. Defendants' actual knowledge of their clearly established Fourteenth Amendment obligation to provide due process of law prior to revoking plaintiffs' release status, including notice and an opportunity for a hearing, is confirmed by defendants' own regulations which grant such rights. *See, e.g.*, COMAR 12.08.01.22A, 12.08.01.22E, 12.08.01.22F.

46. Without any factual or legal justification, defendants deliberately and intentionally revoked plaintiffs' release status and subjected them to the grievous loss of their liberty and incarceration without any process whatsoever and in violation of plaintiffs' clearly established Fourteenth Amendment rights.

47. Each defendant is personally liable to each plaintiff for compensatory and punitive damages for the harm which each defendant caused each plaintiff in amounts to be determined at trial.

Prayers for Relief

WHEREFORE, plaintiffs pray that, after trial and pursuant to 42 U.S.C. § 1983, a monetary judgment be awarded to each plaintiff against each defendant individually for each plaintiff's compensatory and punitive damages in the amounts proven at trial, plus attorneys' fees pursuant to 42 U.S.C. § 1988, the costs of this action, and such other and further relief as is just.

Demand for Jury Trial

Plaintiffs demand a jury trial on their claims.

April 6, 1999

Respectfully submitted,

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Attorneys for Plaintiffs

0035 Appendix 2 to DCD 110-19

[SEAL]

MARYLAND DIVISION OF CORRECTION
RETAKE WARRANT
FOR ARREST & DETENTION OF
ESCAPED PRISONER

TO ANY SHERIFF OR POLICE OFFICER authorized to serve criminal process, and to the chief administrative officer in charge of any jail, lockup, or other place of detention:

CURRENT KNOWN ADDRESS:
29552 JENNIFER DRIVE
MECHANICSVILLE, MD 20659

NAME:

Henderson	Vincent	R.	DOC #242859
(Last)	(First)	(Md.)	FBI #746780H

Description: Sex Male Race Black Date of Birth 03-30-1952 Ht. 5ft 8in Wt. 156 Hair Black Eyes Brown Complexion Medium Build _____

LD. Marks None

WHEREAS, the above-named inmate, who is under legal commitment to the Maryland Division of Correction, on or about May 1, 1998 escaped from the custody of The Division of Correction (Institution) where he was serving 28yrs 10mo 7days year(s) for the crime(s) of ARMED ROBBERY, WEAPONS, NARCOTICS

therefore, the **MARYLAND DIVISION OF CORRECTION** pursuant to its authority under article 27, section 682(d) of the Annotated Code of Maryland, does hereby

direct that said inmate be taken into custody wherever found and, further, that the Division of Correction be notified promptly of said inmate's apprehension.

Maryland Reception, Diagnostic &
Classification Center 410-332-0970
(Name and telephone number of facility designated as point of return)

This warrant is issued as a result of a court decision requiring a recalculation of the offenders term of confinement and will expire on 2002/07/03.

5-1-98	9:20/AM	/s/ W.O. Robert, Jr Warden
Date	Time	Authorized Issuer/Title

For police use only
Arrest Number _____

N.C.I.C. Police ORI _____

Distribution of Copier:
Original - Md. State Police
2nd Copy - Commitment File
3rd Copy - State's Attorney's Office
4th Copy - Inmate Basefile

DC Form 110-19b (Rev. 1/97)

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial offices of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an

executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code Annotated, Title 42

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
DEC 4 2000
CLERK

(2)

No. 00-708

IN THE
Supreme Court of the United States

VINCENT HENDERSON, *et al.*,
Petitioners,

v.

STUART O. SIMMS, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 AP

QUESTION PRESENTED

Did Maryland prison officials violate any clearly established procedural due process rights of which a reasonable person would have known in issuing retake warrants, arresting, and reincarcerating three former prisoners after the officials determined, as a result of an intervening decision of Maryland's highest court, that the State had miscalculated the prisoners' release dates and had prematurely released them from incarceration?

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STATEMENT OF THE CASE

This case was triggered by the State of Maryland's act of reincarcerating petitioners upon determining, on the basis of the decision of Maryland's highest appellate court in *Beshears v. Wickes*, 349 Md. 1, 706 A.2d 608 (1998), that their prior release from prison was erroneous because the State miscalculated their original release dates in light of *Wickes*. In a habeas proceeding brought by petitioner Vincent Henderson, the Maryland Court of Appeals in *Secretary, Dept. of Public Safety and Correctional Services v. Henderson*, 351 Md. 438, 718 A.2d 1150 (1998), held that the State's original release decision was correct under Maryland law, that the State's recalculation of Mr. Henderson's release date, though mistaken, was "understandable" in light of the Court's decision in *Wickes*, and that, by using overly broad language in *Wickes* from which the Court in *Henderson* retreated, "we inadvertently led the [State] to a conclusion that was both unintended and erroneous." *Id.* at 452, 453, 718 A.2d at 1157, 1158.

Despite this unusual admission by the State's highest court that its decision in *Wickes* reasonably led State correctional officials to a mistaken recalculation of many inmates' sentences, Mr. Henderson and his co-petitioners, two other former inmates, subsequently filed this suit seeking to hold three high-ranking State correctional officials (collectively "respondents" or "the State") personally liable in damages for purportedly violating, *inter alia*, petitioners' procedural due process rights under the Fourteenth Amendment. (App. 27-43.) The United States District Court for the District of Maryland (Smalkin, J.) granted the State's motion to dismiss the complaint, holding that qualified immunity barred petitioners' claims because "there could hardly be a clearer case for concluding that state officials acted 'reasonably, but mistakenly.'" (App. 23.)

Stating that respondents "were simply making a good faith effort to put into effect what the Court of Appeals later characterized as its own legally erroneous interpretation of Maryland law" (App. 23), the district court rejected

petitioners' reliance on cases such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), by distinguishing "the situation in *Morrissey* (where the plaintiff was unquestionably enjoying a legitimate period of liberty between his parole release and its revocation) and the situation confronting these defendants after *Wickes* (under which plaintiffs were not entitled to release *ab initio*)." (App. 23.) The district court concluded that respondents did not violate any clearly established procedural due process rights and thus were entitled to qualified immunity, stating that, "faced with state law as it was declared to them by the highest court in Maryland at the time of the retakes, the officers certainly reasonably could have believed that the plaintiffs had no protected liberty interest that demanded pre-deprivation notice and a hearing." (App. 24.)

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's dismissal of the complaint. Agreeing with respondents that, "under Maryland law and law from other jurisdictions, prisoners erroneously released from incarceration hold the same status as escapees for purposes of their reincarceration" (App. 10), the court of appeals stated that petitioners "by their own admission" "do not challenge the reasonableness of [respondents'] misinterpretation of *Wickes*, and by implication, the reasonableness of [respondents'] belief that [petitioners] had been mistakenly released." (App. 16.) Recognizing that "[a] prisoner who is mistakenly released does not have a protected liberty interest because, unlike a parolee, he does not have a 'legitimate claim of entitlement' to freedom" (*id.*) (citations omitted), the court of appeals held that, "[w]ith no liberty interest to protect, there is no violation of due process and no need for the pre-detention hearings contemplated by *Morrissey* and its progeny." (*Id.*)

The court of appeals also held that even if such a liberty interest existed, respondents were entitled to qualified immunity because "this right was not clearly established at the time of [petitioners'] arrests." (App. 17.) The court

observed that although it had previously "recognized that the due process requirements of *Morrissey* applied to revocations of pardons and revocations of supervised release" (*id.*), "the liberty interest of a mistakenly released prisoner differs greatly from the liberty interest of a prisoner who has been pardoned or a prisoner who is on supervised release . . . ." (*Id.*) Stating that "it does not automatically follow that a mistakenly released prisoner is entitled to a hearing to challenge his arrest and reincarceration" (*id.*), the court held that petitioners' "Fourteenth Amendment rights in this particular context, even if recognized, were not sufficiently clear at the time of their arrests to notify reasonable state officials in [respondents'] position that their denial of a hearing to [petitioners] was unlawful." (*Id.*)

REASONS FOR DENYING THE WRIT

The unique facts of this case make it extremely unlikely that the court of appeals' decision will have any effect beyond this litigation. Indeed, other than the courts below, no court has even addressed, much less decided, the precise issues presented here. Further review of this case will result in little, if any, guidance in other cases and is thus unwarranted because the decision of the court of appeals rests on an unusual fact-based determination.

That determination also gives rise to no error that could conceivably justify the exercise of this Court's discretionary jurisdiction. The court of appeals found that an erroneously released prisoner may be summarily retaken into custody under longstanding Maryland precedent, that petitioners have never challenged "the reasonableness of [respondents'] belief that [petitioners] were released 'through some illegal or void order'" (App. 11), and that respondents "reasonably thought that [petitioners] were mistakenly released prisoners with no cognizable interest in remaining at liberty." (App. 3.) The court of appeals decided no novel or unsettled questions of federal law but rather applied well-established legal principles in concluding that respondents

violated no clearly established due process rights in reincarcerating petitioners on the basis of this belief.

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

In evaluating a claim of qualified immunity, "a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 119 S.Ct. 1692, 1697 (1999) (quoting *Conn v. Gabbert*, 119 S.Ct. 1292, 1295 (1999)). *See also Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991). Petitioners' claims are barred by qualified immunity for the principal reason that petitioners have failed to demonstrate that the conduct resulting in their reincarceration caused any constitutional violation.

Petitioners' due process claim is based on a narrow view of qualified immunity that this Court has rejected and need not revisit. Rather than embrace their restrictive approach to qualified immunity that any purported violation of the Constitution is "clearly established," the Court has held that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 119 S.Ct. at 1700 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Instead of discussing cases at the appropriate level of specificity, however, petitioners rely exclusively on general Fourteenth Amendment principles announced in cases such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in which an individual's release had been revoked due to violations committed while on parole. Those decisions do not involve conduct remotely similar to that at issue here and are inapplicable in cases involving the incarceration of individuals reasonably believed to have been erroneously released from prison.

While petitioners claim that their status as escapees is

irrelevant, Pet. at 5, that status is critical because, as the Maryland Court of Appeals recognized over seventy years ago, "[t]he decided weight of authority, and, in our opinion, the better reasoned cases, hold that, where a prisoner secures his liberty through some illegal or void order, it is to be treated as an escape, and he can be retaken and compelled to serve out his sentence . . . ." *Hopkins v. North*, 151 Md. 553, 556, 135 A. 367, 368 (1926). The same conclusion has been reached in other jurisdictions. "A void parole has no effect on the original judgment; and, where the sentence is lawful, a prisoner at large on an illegal and void parole is on the same plane as an escapee. Accordingly, no rights of the prisoner are violated under a purported parole, which is invalid, when he is returned to prison." *Jefferson v. Morris*, 548 N.E.2d 296, 298 (Ohio App.1988) (quoting 67A Corpus Juris Secundum, Pardon & Parole, § 57, at 95 (1978)). *See also Fredericks v. Gladden*, 315 P.2d 1010, 1016 (Ore.1957) ("If at a time when the defendant was illegally at large he was apprehended and returned to the penitentiary, his term not having then expired, we need not inquire how he got there.") (citing *Hopkins v. North* and other cases).

In light of these cases, there is nothing exceptional about the court of appeals' holding that the State did not act unlawfully in reincarcerating petitioners on the basis of recalculation decisions – whose reasonableness the Maryland Court of Appeals explicitly recognized in *Henderson* – which demonstrated that each petitioner's "release was invalid, and that the [State's] action in releasing him, though done in good faith, was unauthorized and illegal . . . ." *Hopkins v. North*, 151 Md. at 557, 135 A. at 368. Rather, the State's conduct was in full accord with the settled proposition that "under common law a convicted person erroneously at liberty must, when the error is discovered, serve the full sentence imposed." *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir.1988). *See also Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir.1984) ("The prison authorities had the power to recommit Green

after he had been released by mistake so long as his sentence would not have expired had he remained in confinement."); *Davis v. State*, 723 S.W.2d 366, 367 (Ark. 1987) (finding irrelevant "the lapse of time on the sentence where a defendant has been released under a void order prior to the completion of her sentence").

The court of appeals' decision is also consistent with other cases in which courts have rejected constitutional challenges to the arrest and reincarceration of individuals mistakenly released from prison. In *Campbell v. Williamson*, 783 F.Supp. 1161 (C.D.Ill. 1992), for example, the court found that an individual who had been mistakenly released from prison had "no cognizable liberty interest in remaining free" because the State continued to have "legal custody due to the Plaintiff's unfinished sentence," *id.*, and so there was "no cognizable constitutional violation in the Plaintiff's detention and return to state custody." *Id.* at 1163. *See also United States v. Polito*, 583 F.2d 48, 55 (2nd Cir.1978) ("[I]t cannot be said that the retaking of a prisoner who is already within the legal custody of the authorities constitutes an arrest within the meaning of the constitutional provisions.") (quoting *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir.), *cert. denied*, 305 U.S. 595 (1938)).

Similarly, in *McKellar v. Arizona State Dept. of Corrections*, 566 P.2d 1337 (Ariz.1977), the court upheld the summary arrest and reincarceration of an individual who was taken back into custody when the State determined, almost three months after releasing him on parole, that it had incorrectly computed his parole eligibility date. Stating that "[a]s soon as its mistake was realized, the state reasserted custody of appellant" and that "it clearly never lost jurisdiction," *id.* at 1339, the court rejected the prisoner's argument that he was "entitled to minimal due process before he's taken back into custody," *id.*, and held instead that it could "find no authority which would allow us to order disobedience to the mandatory provisions of" Arizona law requiring the prisoner's completion of his sentence. *Id. See also Jefferson v. Morris*, 548 N.E.2d at

298 (no constitutional violation in reincarcerating a prisoner when he "was not eligible for parole and the Adult Parole Authority was without authority to parole appellant since by his own admission appellant had served only about five years of his life sentence"); *State v. Bandics*, 805 P.2d 66, 68 (Nev. 1991) (reversing as "clearly erroneous and not supported by substantial evidence" the trial court's findings that the arrest and reincarceration of a prisoner whose detainer had been erroneously released constituted "waiver, equitable estoppel and [a] violation of due process").

By ignoring this more specific authority and invoking broad principles announced in factually inapposite cases that have no application here, petitioners have improperly defined the right at issue too abstractly and thus converted the defense of qualified immunity "into a rule of unqualified liability." *Anderson v. Creighton*, 483 U.S. at 639. While "general statements of the law are not inherently incapable of giving fair and clear warning," *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997), such statements, or broadly analogous case law, must apply with "obvious clarity to the specific conduct in question" in order to constitute "fair warning." *Id.* Respondents' actions are supported by specifically analogous case law that confirms the propriety of their conduct, which is not even covered, much less proscribed, by the general principles that petitioners invoke. The court of appeals in this case thus decided nothing legally remarkable in concluding that procedural due process is not violated by the State's efforts to safeguard the public's safety and welfare by returning to custody convicted felons determined to have been erroneously released from prison.

In addition to relying on factually inapposite cases, petitioners also seek support for their claim in the State's purported "total failure to afford the petitioners a hearing to challenge the revocation of their release status . . . ." Pet. at 9. As other courts have recognized, the summary arrest and reincarceration of an escaped prisoner does not violate any due process rights because, "first, the convict has

already received all the process he is due concerning his conviction and sentence; second, the danger of erroneous deprivation – for example, in a case of mistaken identity or a legitimate dispute concerning the fact of escape – is alleviated by the availability of habeas corpus relief." *Tavarez v. U.S. Attorney General*, 668 F.2d 805, 810 (5th Cir.1982) (footnotes and citation omitted). These considerations, which are equally applicable in cases such as this when prison authorities determine that a prisoner has been erroneously released and thus may "be treated as an escape," *Hopkins v. North*, 151 Md. at 556, 135 A. at 368, confirm that petitioners have not been unlawfully denied due process of law.

Maryland's habeas corpus statute provides that "[a] person committed, detained, confined, or restrained from his lawful liberty within the State . . . under any color or pretense . . . may petition for the writ of habeas corpus . . . ." Md. Cts. & Jud. Proc. Code Ann. § 3-702(a) (1998 Repl. Vol.). A petition for a writ of habeas corpus shall be referred to a judge who "shall immediately inquire into the legality and propriety of the confinement or detention," *id.*, 3-704(a), and "shall release or discharge the person immediately" upon a showing "that the person is detained without legal warrant or authority . . . ." *Id.*, § 3-704(b).

As petitioners' complaint makes clear, habeas relief was not only available in this case, but it resulted in their release within approximately two weeks of their incarceration. (App. 37-39 ¶¶ 29-33.) Thus, petitioners acknowledge that habeas corpus relief was available to them from the outset of their reincarceration *and* that all of them were released from incarceration as a result of the habeas proceedings. *See also* Pet. at 3-4. Petitioners are fundamentally mistaken, therefore, that the State never provided any hearing "of any sort, at any time." *Id.* at 9. The timing of petitioners' release from incarceration not only falls well within the time frame of the initial hearing that *Morrissey* stated should be held "promptly . . . after arrest," 408 U.S.

at 485, but is also consistent with the observation in *Morrissey* that "[a] lapse of two months" between the time the individual is taken into custody and the final hearing "would not appear to be unreasonable." *Id.* at 488. *See also Pierre v. Washington State Board of Prison Terms and Paroles*, 699 F.2d 471, 473 (9th Cir.1983) ("Since the on-site hearing was conducted only 21 days after appellant's parole was suspended, it was prompt enough to qualify as the preliminary probable cause determination required by *Morrissey*."); *State v. Myers*, 545 P.2d 538, 544 (Wash. 1976) ("Appellant first argues that the failure to conduct a 'preliminary hearing' was a denial of due process. This argument is without merit because in this case the final revocation hearing itself was held within 30 days after the arrest warrant was issued.").

The habeas remedy made available to petitioners establishes that, even under their view of the Fourteenth Amendment, their constitutional rights were not violated because they were provided a timely opportunity to challenge "the legality and propriety of the confinement or detention." Md. Cts. & Jud. Proc. Code Ann. § 3-704(a). That hearing opportunity is not rendered unconstitutional merely because petitioner Henderson filed his habeas petition almost immediately after his reincarceration and before the State was able to offer administrative hearings to him and the other former prisoners who were taken back into custody. All that due process requires is an opportunity to be heard at a meaningful time, *see, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), which petitioners unquestionably received.

While many cases support the governmental conduct at issue in this case, petitioners have failed to cite any case that holds that the act of arresting and reincarcerating convicted felons who were determined to have been mistakenly released from prison violates the rights that petitioners assert in this case. The most that they have established is that the State's recalculation of their release dates and its corresponding decision to reincarcerate them were, in

hindsight, erroneous. Even if that conduct could be characterized as negligent – and the Maryland Court of Appeals' decision in *Henderson* demonstrates it was not – it would not violate the Constitution because "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1718 (1998). Review of this case is thus unwarranted because petitioners have failed to "establish the violation of any constitutional right at all." *Siegert v. Gilley*, 500 U.S. at 233.

Certiorari is also inappropriate because the petition does not seek review of the additional and independent reason that the court of appeals provided in holding that respondents are also entitled to qualified immunity because no clearly established due process right existed to place them on notice that their actions were unlawful. (App. 16-17.) A government official cannot be held liable for damages by engaging in conduct that does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even if respondents were incorrect to reincarcerate convicted felons upon determining that they were released from prison mistakenly, respondents "nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

In the absence of any contrary case law that addresses the conduct at issue here, it would be anomalous to hold law enforcement officials to a higher standard of constitutional clairvoyance than judges and to subject them to personal liability for running afoul of constitutional principles that no court has ever announced in a case involving facts such as this one. Government officials "cannot have been 'expected to predict the future course of constitutional law,'" *Wilson v. Layne*, 119 S.Ct. at 1701 (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)), when, as in this case, the plaintiffs have failed to bring to the Court's "attention any cases of controlling authority in their jurisdiction at the time

of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 119 S.Ct. at 1700.

Given the existence of cases that directly support respondents' actions, it would be even more "unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges." *Anderson v. Creighton*, 483 U.S. at 639 n.2. Petitioners underscore that unfairness in this case by failing to identify any factually-apposite decision that supports them. Absent such a decision, this case presents no issue on which the federal and state appellate courts require this Court's guidance.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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